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IN THE

Supreme Court Of The United States

October Term, 1995

REVEREND PAUL SCHENCK
and
DWIGHT SAUNDERS,

Petitioners

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae is a non-profit civil liberties organization named for Samuel Rutherford, a 17th-century Scottish minister and rector of St. Andrew's University. The Rutherford Institute is comprised of attorneys, judges, physicians, law students, educators and other citizens dedicated to the protection of

[1] Counsel of record to the parties in the case described above have consented to the filing of the brief and letters of consent have been filed with the Clerk pursuant to Rule 37.

religious liberty, freedom of speech and other constitutional guarantees. Counsel for *Amicus Curiae* have specialized in litigation in state and federal courts and have participated as counsel in previous significant cases before this Court.

The Rutherford Institute believes that the paramount worth of human life and the right to individually or in association with others express unpopular points of view are two of the values most deeply rooted in the law and history of the United States. Diminishing the value of any human life diminishes the lives of all citizens. Prohibiting the peaceful expression of unpopular or controversial points of view further diminishes the freedoms enjoyed by all citizens. The Rutherford Institute believes that the instant case, addressing as it does these fundamental constitutional liberties, is important to constitutional jurisprudence and the growth and progress of the nation.

Affirming the lower court's decision in the instant case would detrimentally impact the exercise of First Amendment freedoms by all citizens. *Amicus Curiae* therefore has a vital interest in seeking reversal of the decision of the lower court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amicus Curiae adopts by reference the statement of facts as set forth in Petitioners' brief filed with this Court.

SUMMARY OF ARGUMENT

By seeking to prohibit the peaceful exercise of free speech rights under the First Amendment to the United States Constitution, the decision of the lower courts has sounded the warning knell for all those who, now or in the future, wish to express views that may not be majoritarian at a given point in time. Societal mores shift and sway with changing times, but do the Constitutional freedoms for which George Washington and

Thomas Jefferson fought also have to sway in the wind or should those fundamental expressions of human rights be the bedrock upon which we build a just and humane society?

Americans have jealously guarded their right of free association for over 200 years as being vital to the proper maintenance of the checks and balances of government. A core element of that right of association is the right to peacefully assemble in traditional public fora, and the concomitant right to speak in such fora. A legislative blanket ban on the exercise of such fundamental First Amendment rights properly would be struck down by this Court. A judicial blanket ban on the exercise of such First Amendment rights should not be allowed to stand any more than would a legislative ban.

Prior restraint of the freedom of speech of citizens is anathema to our democratic form of government. Precedent demonstrates that it has been anathema to this Court as well. However, the decision of the lower courts in the instant case gives power to a select group of citizens to censor and prohibit the constitutionally protected speech of other citizens, and provides to that select group the full force and support of law enforcement and the judicial system as a threat to the speech of the disfavored citizens.

ARGUMENT

I. OUR SOCIETY IS NOT FOUNDED ON THE TOTALITARIAN VIEW OF SOCIETY WHICH REQUIRES ALL SPEECH TO BE IN ACCORDANCE WITH OFFICIAL GOVERNMENT POLICY AND ALL ASSEMBLIES TO BE REPRESENTATIVE OF THAT POLICY.

One of the most important features of our form of government is the freedom of all those within the shadow of the flag to associate with one another and to express values which are divergent from those embraced by others. It is a cornerstone of our

political life that the state may not dictate the thoughts of its citizens, and that neither the state nor any citizen may require another to act, or cease to act, against the dictates of belief or conscience. For this Court to adopt a constitutional model which would require private citizens to conform to transient public values would therefore effect a departure from our historical form of government.

Justice Douglas, in his dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), illustrated the dangers of such a course in quoting from Calhoun's *Democracy and Natural Law*, 5 Natural Law Forum 31, 36 (1960):

> One of the earmarks of the totalitarian understanding of society is that it seeks to make all subcommittees -- family, school, business, press, church -- completely subject to control by the State. The State then is not one vital institution among others . . . Instead it seeks to be coextensive with family and school, press, business community, and Church, so that all of these component interest groups are, in principle, reduced to organs and agencies of the state. In a democratic political order, this megatherian concept is expressly rejected as out of accord with the democratic understanding of social good, and with the actual make-up of the human community.

Poe at 521-22.

> In *Terminiello v. Chicago*, 337 U.S. 1 (1949), this Court said:
>
> [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Id. at 4.

This Court has accorded significant constitutional protection to the freedom of association, as well as to specific groups who have fallen outside the societal norms of the time. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), this Court upheld the right of parents to send their children to private schools and eschewed legislative interference with this right. In two cases before this Court the right of individuals to obtain and use contraceptives was supported *(Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)). *Zablocki v. Redhail*, 434 U.S. 374 (1978) and *Loving v. Virginia*, 388 U.S. 1 (1967), recognized the right of individuals to marry, and *Boddie v. Connecticut*, 401 U.S. 371 (1971) provided legal support to the right to divorce. *Roe v. Wade*, 410 U.S. 113 (1973), the case which forms the foundation of the controversy which has ultimately led to the case now before the Court, itself represented a departure from the historical norms of Western civilization as a whole and a recognition of the shifting mores of society at that particular time in history.

It was the constitutional freedom to disagree and to express that disagreement that enabled these litigants to demand protection from our judicial system. This is one of our most cherished freedoms, yet it is one which is being denied Paul Schenck and other peaceful, law-abiding citizens who do not agree with the currently favored pro-abortion stance of many, but not all, public authorities. Further, the orders of the lower court in the instant case chill the speech of all those who may seek to peacefully protest abortion in the vicinity of the clinic in the future.

The speculative argument that because some of those opposed to abortion have turned to violence it is acceptable, or even necessary, to remove constitutional rights from all who are opposed to abortion -- an argument which was apparently embraced by the majority of the appellate court in the instant case -- is more than merely short-sighted. It raises the specter of totalitarianism in the minds of more than just pro-life demon-

strators. It is a well-founded rule of law in this free country that speculation as to the possible unlawful acts of persons in the future based on the unlawful acts of other persons in the past may not form the basis for any prosecution or punishment.

The decision of this Court in *Madsen v. Women's Health Center,* ___ U.S. ___, 114 S.Ct. 2516 (1994) made no attempt to put the lie to this principle. In that case this Court upheld an injunction which proscribed certain activities within a fixed area around an abortion clinic, but did *not* uphold a prohibition on all uninvited peaceful approaches to persons seeking access to the abortion clinic. The *Madsen* Court also required there to be something more than peaceful demonstrating and attempts at counselling on the public sidewalk. It required "prior unlawful conduct." *Madsen,* 114 S.Ct. at 2524 n.2. Thus, the *Madsen* decision may not be used to justify unconstitutional attempts to chill the speech of customers in a coffee shop close to the site of demonstrations merely because someone who may seek access to the building which is the focus of the demonstration is also a customer. "Floating" zones were not an issue in *Madsen.* Further, the *Madsen* decision may not be used to justify the constitutionality of permitting third parties to chill speech just because they subscribe to a different viewpoint, as occurs when clinic escorts halt attempts at peaceful counselling on the public sidewalk. Indeed, it may not be used to justify the constitutionality of preferring one viewpoint over another in the public arena.

The blurring of the distinction between unlawful behavior and the lawful expression of deeply held convictions does a disservice, not only to judicial precedent, but to the people of this nation who believe their freedom to speak has always been one vital contributing factor to the development of this free society. Growth and development, indeed, would be impossible without controversial speech. Such speech is not *per se* unlawful, and we send the wrong message to all sides of the abortion debate if we say that it is.

Indeed, this Court frequently has expressed the importance of protecting the speech of those who seek to speak out on matters of public concern. In *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749 (1985), this Court, following a line of cases which included *Thornhill v. Alabama,* 310 U.S. 88 (1940) and *First National Bank of Boston v. Bellotti,* 435 U.S. 764 (1978), noted that such speech is at the very heart of the protections afforded citizens by the First Amendment. The Court went on:

> "The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 484 (1957); *New York Times Co. v. Sullivan,* 376 U.S. 254, 269 (1964). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 913 (1982); *Carey v. Brown,* 447 U.S. 455, 467 (1980).

Dunn & Bradstreet, 472 U.S. at 758-59 (footnote omitted).

That the speech of Petitioners relates to an issue of public concern is to understate the present nature of the debate. Placing prior restraints on such speech at the behest of one party to the debate is not only a dangerous precedent to set, but a violation of "the precise freedom which the First Amendment sought to protect against abridgement." *Carroll v. President & Comm'rs of Princess Anne,* 393 U.S. 175, 181 (1968).

II. PRIOR RESTRAINT ON SPEECH CONCERNING ISSUES OF PUBLIC CONCERN IS ANATHEMA TO THE CONCEPT OF DEMOCRATIC GOVERNMENT IN THE UNITED STATES AND VIOLATIVE OF THE VERY FREEDOMS WHICH THE FIRST AMENDMENT WAS ENACTED TO PROTECT.

Our system of law "prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 559 (1975). It is therefore axiomatic that any attempt to regulate speech based upon the communicative impact of expression will subject such content-based regulation to strict scrutiny review by the courts:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . The essence of . . . forbidden censorship is content control.

Police Department v. Mosley, 408 U.S. 92, 95-96 (1972). In that case, this Court struck down an ordinance which restricted picketing outside a school on the basis of the content of the demonstrators' speech.

Even commercial speech, which has not frequently been given a position equal to individual free speech on the "hierarchy" of free speech rights under the First Amendment, has recently been held by this Court to be worthy of protection (*See 44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc. v. Rhode Island and Rhode Island Liquor Stores Association*, 1996 U.S. LEXIS 3020, where this Court held that a blanket ban on liquor price advertising could not be upheld unless the speech itself was flawed, either because it was deceptive or it was related in some way to unlawful activity). If commercial speech

falls under the umbrella of First Amendment protection, how much more must our precious individual freedom of speech be protected where it is a lawful expression of legitimate concern over an issue of public controversy.

Only where speech falls within the parameters of obscenity, defamation, incitement to imminent lawlessness, or fighting words may it fall outside the protection of the First Amendment. Even there, this Court has recognized that such speech cannot be discriminated against on the basis of content where such discrimination is not reasonably *necessary* to achieve government interests. (See *R.A.V. v. City of St. Paul,* ___ U.S. ___, 112 S.Ct. 2538 (1992), where this Court held that a bias-motivated crime ordinance was content-based becuase it prevented too specific a category of expression.)

The *Madsen* decision, by its own definition, does not affect the test for content-based exclusion of communicative activity as enunciated in *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37 (1983). Where there is such an exclusion the State is required to show that such regulation is necessary to serve a compelling State interest and that it is narrowly tailored to achieve that end.

As this Court has stated:

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order.

Carroll, 393 U.S. at 183. The injunction before this Court cannot be described as "narrowly tailored" by any definition of that term.

While the courts have traditionally balanced the right to communicate with the right of others not to be assaulted in that communication, they have consistently held that controversial

speech is protected under the Constitution, and that the right to communicate is meaningless without the ability to convey that communication. As this Court stated in *Terminiello,*" [s]peech is often provocative and challenging . . . [but it] is nevertheless protected against censorship or punishment." 337 U.S. at 4. In *Boos v. Barry,* 485 U.S. 312 (1988), an ordinance prohibiting the communication of messages denigrating a foreign government within a certain distance of that country's embassy was held to be an unconstitutional content-based regulation of speech. The Court held that, "[a]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous speech" in order to protect the freedoms afforded by the First Amendment. 485 U.S. at 322.

Thus, content-based regulations should rarely pass strict scrutiny. *Burson v. Freeman,* 504 U.S. 191 (1992). The right of *access without interruption* to abortion clinics, as against the right to *have* an abortion (which is a completely separate issue not on appeal here), should certainly not be included in that category. This is especially true when this Court noted in *Bray v. Alexandria Women's Health Clinic,* ___ U.S. ___, 113 S.Ct. 753 (1993), that the right to abortion itself "is much less explicitly protected by the Constitution" than the right of free speech. 113 S.Ct. at 764. While the right to speech is not an absolute right, neither is the right to an abortion. Thus, a court which places the right of access to a business which carries out abortions, free from any approach from peaceful picketers, above the constitutionally protected right to free speech, is unilaterally creating a new and fundamental constitutional right which trumps those already held to be on the highest rung of protected rights. Such a court therefore usurps this Court's position as the ultimate arbiter of rights under the Constitution.

The argument that other means of communication are open to Petitioners and other pro-life supporters does not overcome the presumption of unconstitutionality where a no-speech zone

has effectively been created. The communication would not have the same impact were it to be removed to a meeting hall or a town park elsewhere, since those to whom the communication is directed would not be able to receive the information being offered. (*See Hudgens v. NLRB,* 501 F.2d 161 (5th Cir. 1974), where picketing outside a mall within which a subject store was located was held to be not sufficient and where picketing at the store entrance inside the mall was upheld.)

In *The Morality of Consent,* A. Bickel stated eloquently the harm that is done to First Amendment protections when effective communication is stifled:

> Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss -- a loss in the immediacy, the impact, of speech . . . Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech.

The Morality of Consent 61 (1975).

In *Thornhill v. Alabama,* 310 U.S. 88 (1940), a case involving a complete ban on picketing near businesses, this Court held that neither the danger of economic injury nor the mere possibility of violence initiated by labor picketing, were sufficient threats to permit an abridgement of the demonstrators' constitutionally protected right to free speech. 310 U.S. at 105. The Court noted that permitting such a complete abridgement of free speech based solely upon the public concerns arising out of labor disputes would legitimize restrictions on free speech in nearly every instance involving matters of social importance. Over 50 years later apparently it is still necessary to reiterate that the Constitution does not permit sweeping bans on the communication of certain viewpoints.

Certainly there is no constitutional right accorded third parties to interrupt communication, as is the case with the

injunction in the instant case, which requires Petitioners to cease communicating at the instigation of *anyone* present when an attempt is made to peacefully communicate Petitioners' message on the public sidewalk. The constitutional rights of Petitioners may not be denied, "simply because of hostility to their assertion or exercise." *Cox v. Louisiana,* 379 U.S. 536, 555 (1965). (*See also Claiborne Hardware,* 458 U.S. at 910, where the Court held that "speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.")

Injunctions are classic examples of prior restraint on speech, and should be viewed with great suspicion where they enjoin peaceful speech in traditional public fora and where there has been no attempt to engage in conduct outside the law. In the instant case, parties to the suit stipulated, for the purposes of the case, that blockades and mass trespass could be enjoined. Thus, there can be no question that what is being enjoined by the injunction before this Court is peaceful, lawful activity on the part of persons who represent one point of view on a controversial issue.

Restrictions which are sweeping attempts to gag all speech with a particular viewpoint are especially repugnant. As Justice Scalia noted in his dissent in *Madsen:*

> The vice of content-based legislation -- what renders it *deserving* of the high standard of strict scrutiny -- is not that it is *always* used for invidious, thought-control purposes, but that it *lends itself* to use for those purposes. And, because of the unavoidable 'targeting' . . . precisely the same is true of the speech-restricting injunction.

Madsen, 114 S.Ct. at 2539.

A floating zone which prospectively enjoins the expression of one viewpoint only by any and all who hold that viewpoint

is a threat to the constitutional rights of everyone who may find themselves on the "wrong" end of a controversy at a given point in time. As this Court stated in *Nebraska Press Ass'n. v. Stuart,* 427 U.S. 539 (1976), prior restraints are to be considered "the most serious and the least tolerable infringement on First Amendment rights." 427 U.S. at 559. "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971).

The gagging of demonstrators at the discretion of those opposed to their point of view is such an intolerable infringement on the constitutional rights of all citizens of the United States, and we ask that this Court enunciate clearly in its ruling that such a derogation of constitutional rights will not be given judicial approval.

CONCLUSION

There is no doubt that feelings on both sides of the abortion debate run high. There is equally no doubt that there are those involved in the debate who wish to suppress the speech of those with contrary opinions. Law is an imperfect tool of man, and bears relation to virtue only in the eyes of those who approve of any particular enactment or decision. However, it is one of the few tools available to a civilized society to ensure respect for all men. We cannot allow it to be perverted into a weapon in the hands of any particular interest group. Thomas Aquinas wrote:

> [H]uman law is laid down for the multitude the major part of which is composed of men not perfected by virtue. Consequently, all and every vice, from which virtuous men abstain, is not prohibited by human law but only the gravest vicious actions, from which it is possible for the major part of the multitude to abstain, and mainly those -- like homicide, theft, etc. -- which

> are harmful to others, and without the prohibition of which human society could not be preserved.

Jacques Maritain, *Man and the State*, 168 n.24 (1951) (quoting Thomas Aquinas).

We live in an age of increasing intolerance toward anyone with a different point of view. Rejection of such intolerance was one of the major reasons for the founding of this nation.

Whether we are pro-life or pro-choice, open and peaceful communication of that belief is protected by the Constitution. The affirming of an injunction which attempts to ban expression of any viewpoint from the public arena by imposing a "floating" zone of impermeability to such expression would threaten the very underpinnings of this nation. It would be the death knell to free and open debate on any controversial subject where one side denies the right of the other to hold or express their beliefs.

Protection of the fundamental freedoms of the people of the United States requires that the majority decision of the court below be reversed.

Respectfully submitted,

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